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No. 80-1982

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM E. MURRAY, individually and as Indiana Commissioner of Mental Health; J. ERIC HELMER, individually and as Superintendent of Central State Hospital; and ROBERT C. ROEDER, individually and as Indiana State Personnel Director,

Petitioners,

v.

ROSITA L. CUA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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THE QUESTIONS PRESENTED FOR REVIEW

1. Whether Rosita L. Cua was a "regular employee" as defined by the statute of the State of Indiana at the time of her termination from employment by the State of Indiana, which would entitle her to due process proceedings.

2. Whether the discretion of the State's personnel decision-making is unfettered.

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Respondent, Rosita L. Cua, submits her brief in opposition to the Petition for Writ of Certiorari filed in this cause.

JURISDICTION

The judgment and order of the United States Court of Appeals for the Seventh Circuit were entered on February 20, 1981. No petition for rehearing was filed. The Proof of Service of the petitioners sent to the Supreme Court states that the petition for certiorari was mailed on May 21, 1981. The petition invokes this Court's jurisidiction under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

Petitioner's Statement Of The Case does not contain the facts material to the consideration of the questions presented, and it also contains allegations of fact which are not supported by the record. Respondent submits the following facts which are material to the questions presented and submits references to the record.

The respondent Rosita L. Cua was employed as a psychiatrist by the State of Indiana on August 4, 1972, in a "duration appointment." Transcript of Record filed in the Court of Appeals, pages 22, 31, hereinafter abbreviated to R., pp. 22, 31. The probationary period for new employees with the State of Indiana is called a "working test period" which consisted at the time of the complaint of an "original working test period" of six months and a possible extension of not more than six additional months. Indiana Personnel Board Rule 8, §8-2, Burns Indiana Admin. Rules and Regs. (4-15-2-21)-2 (Code Edition, 1976). After almost a year of employment with the State of Indiana, the Personnel Director of the Logansport State Hospital wrote to the Indiana State Personnel Division as follows:

> In reviewing the Manning Table, I notice Rosita Cua, Psychiatrist I, has not received Permanent Status although she has been employed since August, 1972. Since there is no examination for this position, and she qualifies, have we overlooked something. Should we be considering her for Permanent Status?

Plaintiff's Exhibit 9. The handwritten notation on the copy of the above memorandum in the file of the Indiana State Personnel Division reads as follows:

> Called Logansport 7-30-73. License is needed. She only has a Temp. Permit.

Plaintiff's Exhibit 9. Dr. Cua obtained temporary medical permits in 1973, 1974 and 1975. On April 8, 1976, Dr. Cua was issued a Certificate of Physician's License, limited to practice medicine in any state hospital or comprehensive mental health center within the State of Indiana. (Plaintiff's Exhibit 6).

On April 27, 1976, the Supervisor of Recruitment and Certification of the State Personnel Division wrote to the State Personnel Director as follows:

> Subject: Rosita Cua
>
> She was granted a limited license in a State mental hospital. This is a full license and does not have to be renewed as long as she continues to practice in a State hospital; per Joe O'Brien.
>
> In the past, people were issued temporary permits and they had to have them renewed on an annual basis. Therefore, we would not grant those individuals permanent status because their permits were temporary in nature. However, the limited license does not have to be renewed; therefore, it appears that we would have to give these individuals permanent status.

Plaintiff's Exhibit 18. In the margin on the right-hand side of the memorandum is the following handwritten notation:

> Call Joe O'Brien. What is she classified as? Position and employee. Logansport State Hospital.

Plaintiff's Exhibit 18. On the left-hand side of the margin is the following notation:

> Psychiatrist EI on both the position and employee side of the manning table. E20041.

Plaintiff's Exhibit 18.

On August 5, 1976, Dr. Cua wrote a letter to the State Personnel Director asking if she was classified as a "regular employee" under the State Personnel Act, and if not, the reason for not being so classified. Under the Indiana statutes and rules, a "regular employee" is a permanent employee who is provided due process rights. Indiana Code 4-15-2-33, et seq.; Rule 12, §12-5 et seq., Burns Indiana Admin. Rules and Regs. (4-15-2-32)-1 et seq. (Code Edition, 1976). A "regular employee" is defined by statute as follows:

> (n) "regular employee" means an employee who has met the minimum qualifications, passed the examination, completed the working test period and has been certified by the appointing authority for that classification.

Indiana Code 4-15-2-3(n). The same definition is in Rule 1, §1-1(Z), Burns Indiana Admin. Rules and Regs. (4-15-2-3)-1(Z) Code Edition, 1976).

As has already been quoted from Plaintiff's Exhibit 9 above, Rosita L. Cua met the minimum qualifications, and there was no examination for the position of psychiatrist. In place of an examination, the Personnel Division issued "test booklet" scores for "education and training." On August 12, 1976, the State Personnel Division completed a "Test Booklet" form showing a passing "education and training" score for Dr. Cua with an effective date of August 31, 1976. Plaintiff's Exhibit 20.

A rule of the State Personnel Board provided that time spent in a duration appointment would be credited against the required working test period. It stated as follows:

> (C) Time served in duration status which subsequently results in appointment from an employment list shall be credited against and deducted from the required working test period.

Rule 8, §8-2(C), Burns Indiana Admin. Rules and Regs. (4-15-2-21)-2(C) (Code Edition, 1976). Dr. Cua had already worked three and one-half years as a duration appointment. The State Personnel Director testified and the district court made a finding that Dr. Cua's working test period began and ended on the same day, August 31, 1976. Tr. 40, Petition Appendix, p. 11.

On October 15, 1976, Superintendent Helmer certified the appointment of Dr. Cua to the position of Psychiatrist E1 appointed from the open competitive list effective August 31, 1976, and the certification was approved by the State Personnel Director on October 21, 1976. Plaintiff's Exhibit 25. Dr. Cua was a regular employee effective August 31, 1976, since she met the minimum qualification, she had passed the examination, she had completed the working test period, and she had been certified by the appointing authority for that classification, as provided by statute.

On September 3, 1976, Dr. Cua and four other doctors requested a special meeting of the medical staff, but Dr. Cua's supervisor refused to call a meeting, eventhough the Staff By-Laws require such a meeting. R. 25, 52. On September 16, 1976, Dr. Cua's attorney wrote a letter to the Governor of the State of Indiana about Dr. Cua's supervisor. On October 14, 1976, Dr. Cua's attorney wrote another letter to the Governor about Dr. Cua's supervisor. Tr. 184-185.

On November 4, 1976, Dr. Cua's supervisor requested a three month extension of Dr. Cua's working test period, and Dr. Cua refused to sign the request because she had already completed her working test period. Plaintiff's Exhibit 28. Upon receipt of the paper request for extension, the State Personnel Division clerk automatically changed the end of the working test period card from "8-31-76" to "12-1-76".

On November 22, 1976, Dr. Cua's attorney wrote a third letter to the Governor about the supervisor. On December 3, 1976, the Supervisor requested another extension of Dr.

Cua's working test period, and Dr. Cua again refused to sign the request. Plaintiff's Exhibit 30. The State Personnel Division clerk automatically changed Dr. Cua's end of the working test period card from "12-1-76" to "2-1-77".

On January 17, 1977, the supervisor signed a statement that permanent status would not be granted to Dr. Cua, and Dr. Cua refused to sign the statement, since she already was a "regular employee". Plaintiff's Exhibit 33.

On January 18, 1977, Dr. Cua's attorney wrote to Superintendent Helmer stating that a hearing was necessary before termination, but there was no response. Plaintiff's Exhibit 35. On January 20, 1977, a notice was sent directly to Dr. Cua from the Superintendent stating that she would be dismissed effective January 31, 1977. Plaintiff's Exhibit 36.

On February 1, 1977, Dr. Cua filed this action, and the parties agreed at the pretrial conference to try the case on the sole issue of whether Dr. Cua was a "regular employee". R. pp. 34, 35, 36, 37. Under the State statute and the rules of the State Personnel Board, a "regular employee" of the State of Indiana has a right to due process proceedings before dismissal from state employment. Indiana Code 4-15-2-34; Rule 12, §12-3, Burns Indiana Admin. Rules and Regs. (4-15-2-34)-1 (Code Edition, 1976).

SUMMARY OF THE ARGUMENT

Dr. Cua completed her working test period on August 31, 1976, because she received credit against her working test period for the three and one-half years that she had worked as a duration appointment. The appointing authority certified her to the classification of Psychiatrist E1 on October 15, 1976, effective August 31, 1976, and the certification was approved by the State Personnel Director on October 21, 1976. Dr. Cua was a "regular employee" entitled to due process proceedings provided by the State statutes and rules.

ARGUMENT

I. ROSITA L. CUA WAS A "REGULAR EMPLOYEE" AS DEFINED BY THE STATUTE OF THE STATE OF INDIANA AT THE TIME OF HER TERMINATION FROM EMPLOYMENT BY THE STATE OF INDIANA, AND SHE WAS ENTITLED TO THE DUE PROCESS PROCEEDINGS PROVIDED FOR A "REGULAR EMPLOYEE."

The Petitioners have framed the Questions Presented in their Petition For Writ of Certiorari to contend that Dr. Cua had not "successfully completed the working test period" and had not "been certified for permanent merit status by the appointing authority." Petition, page i. The State Personnel Director testified and the district court found that the working test period for Dr. Cua began and ended on August 31, 1976. The petitioners have contended that the credit under the rule for time served in duration status could be credited only against the "original working test period" and not to any extension which would be required of an employee. However, the State Personnel Board's amendment of the crediting rule shortly after the State Personnel Director was served with Interrogatories in this case shows that the rule in effect during the times in the complaint was not limited to credit against the "original working test period". The 1977 amendments to the crediting rule reads as follows with the amendments emphasized:

> (C) Time spent in duration *or provisional* status, *not to exceed a period equal to the length of the original working test period,* which subsequently results in appointment from an employment list shall be

> credited against and deducted from the required working test period.

Rule 8, §8-2, Burns Admin. Rules and Regs. (4-15-2-21)-2(C) (Code Edition, 1978 Cumulative Pocket Supplement). Thus, it is clear that the rule as it existed before the amendment and during the times in the complaint gave credit for duration status against the entire "required working test period" and was not limited to the "original working test period".

There are additional reasons why the credit was not limited to the "original working test period." The State Personnel Director testified that it was impossible to interpret the crediting rule in such a limited manner and still comply with the State statute and other rules. Tr. 41, 42. For example, any extension of the working test period had to be requested with specific reasons before the end of the original working test period. Rule 8, §8-3, Burns Indiana Admin. Rules and Regs. (4-15-2-21)-3 (Code Edition 1976). Thus, if the "original working test period" has already been completed because of the credit, no extension of the working test period could be requested under the extension rule.

Petitioners emphasize the term "successfully completed his working test period" in the definition of permanent status and imply that an additional certification was required. Rule 1, §1-1(AA), Burns Admin. Rules and Regs. (4-15-2-3)-1(AA) (Code Edition 1976). No such additional certification was required during the times in the complaint.

After the complaint, and after interrogatories had been sent to the State Personnel Director, the State Personnel Board added a new rule which does require an additional approval, at least for employees coming from duration status. It reads as follows:

> *Acquisition of permanent status*—Except as provided in sections 8-2(B) and 8-2(D) [subdivisions

> (B) and (D) of (4-15-2-21)-2] of this rule, no persons shall be deemed to have permanent status unless the appointing authority has submitted a written recommendation to the director that such person be granted permanent status, and such recommendation has been approved by the director.

Rule 8, §8-4, Burns Indiana Admin. Rules and Regs. (4-14-2-21)-4 (Code Edition, 1978 Cumulative Pocket Supplement). There was no such rule during the events in the complaint. Petitioners contend that in no case could permanent status be achieved without this additional approval, but further evidence that there was no such general rule is the fact that even the new rule does not cover all cases. The new rule does not apply to reemployment appointments (subdivision (B)) or to similar position appointments (subdivision (D)). Thus, it is clear that during the events in the complaint, there was no requirement for the recommendation and approval of permanent status, over and above the statutory requirements for a "regular employee".

Petitioners contend that Dr. Cua had not been "certified for permanent merit status by the appointing authority". There was no such certification required, and petitioners are apparently referring to the recommendation and approval required by the above-quoted new rule which did not apply to Dr. Cua. The only "certification" required for "regular employee" under the statutes and rules was that he must have "been certified by the appointing authority for that classification." Indiana Code Section 4-15-2-3(n); Rule 1, §1-1(Z), Burns Indiana Admin. Rules and Regs. (4-15-2-3)-1(Z) (Code Edition, 1976). Dr. Cua was certified for the specific classification of Psychiatrist E1 on October 15, 1976, effective August 31, 1976, and the certification was approved by the State Personnel Director on October 21, 1976. No other certification was required by any statute or rule in existence at the time of Dr. Cua's employment.

That no additional certification was required by the law is shown by the Indiana Supreme Court decision of *Indiana*

State Personnel Board v. Beaumont, 247 Ind. 281, 215 N.E.2d 192 (1966). The *Beaumont* decision held that a therapist who held a position which could be filled by competitive examination and who had completed the working test period without any objection made during the working test period held permanent status.

The working test statute provides that at any time during the working test period, after the first two months thereof, the appointing authority may remove an employee without an opportunity to be heard. Indiana Code 4-15-2-21. When the working test period has been completed, and the employee becomes a "regular employee" due process proceedings are provided for by statute. Indiana Code 4-15-2-34 et. seq.

II. THE DISCRETION OF THE STATE'S PERSONNEL DECISION-MAKING IS NOT UNFETTERED, AND THE LOSS OF INCOME AND THE ADVERSE TERMINATION FROM EMPLOYMENT ADVERSELY IMPACTS UPON THE INDIVIDUAL.

Petitioners quote the statement in *Bishop v. Wood*, 426 U.S. 341, 349 (1976), that the States "may grant or withhold tenure at their unfettered discretion." Petitioners then argue that there is "unfettered discretion of State personnel decision-making." The fact that States have unfettered discretion in formulating their tenure systems does not mean that once the statutes and rules are enacted the state personnel decision-makers have unfettered discretion. Quite the contrary, the statutes and rules provide the requirements of law which must be obeyed by the personnel decision-makers.

The petitioners also argue that payment of the employee's wages would adversely impact on the State of Indiana. This is another silly argument. If there is any substantial adverse impact as a result of the actions in this case, it is the impact on the individual employee. She has

suffered the disgrace of being fired from a state mental hospital without being able to tell here side of the story, and she has lost several years of wages.

Furthermore, the State not only wrongfully terminated Dr. Cua, the State has had the power at all times to make Dr. Cua whole and has refused to do so. The longer the proceedings are drawn out, the more the damages, expenses, and fees are increased. Instead of ending the dispute peacefully and quic..ly, the State continues to drag out the proceedings with a petition for writ of certiorari mailed on the last possible day.

The petitioners filed a motion for stay of execution of the judgment in the Court of Appeals and the motion was denied. The district court had set a hearing on damages for April 24, 1981, and the hearing was continued on motion of the petitioners when they represented that they would file simultaneously with a petition for writ of certiorari a Petition for Stay of Execution. Motion for Continuance, April 22, 1981. Petitioners have not filed any such petition for stay which could be ruled on, and the parties are now left to await the ruling on the petition for writ of certiorari. All of this delay and increase in damages, expenses and fees is due to the petitioner's own actions and they can not now complain about the amount of damages which they have inflicted upon Dr. Cua.

Lastly, the petitioners may introduce evidence of the amount of income of the State of Indiana in the damages hearing on the issue of punitive damages, but evidence of financial condition of the parties does not affect the issues of liability and compensatory damages. It has always been the theory of our government and a cardinal principle of our jurisprudence that the rich and poor stand alike in courts of justice and that neither the wealth of one nor the proverty of the other shall be permitted to affect the administration of law. *Laidlaw v. Sage*, 158 N.Y. 73, 52 N.E. 679, 690 (1899).

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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